Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

KARRIS BILAL,

Petitioner,

vs.

BP AMERICA, INCORPORATED and JAMES DIETZ,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

KARRIS BILAL
150 N. Michigan Avenue, Suite 2800
Chicago, Illinois 60601
(312) 624-7709

QUESTIONS PRESENTED

(1) Whether in light of this Court's holding in *Anthony Ash and John Hithon v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006), summary judgment is proper when there is evidence that a white decision-maker addressed an adult African-American male Employee as "boy" and then told the African-American Employee that if it were left up to him the white decision-maker would not hire any African-Americans, and that if the African-American Employee caused trouble or reported the white decision-maker, the white decision-maker would destroy the African-American Employee's "black ass."

(2) When a plaintiff demands trial by jury, who should determine the meaning of racial or discriminatory remarks – including the context, inflection, tone of voice, local custom, and historical usage.

PARTIES

The parties to this action are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Karris Bilal respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition, which has not yet been designated for publication or reported. The order of the United States court of appeals denying rehearing appears at Appendix C to the petition, which has not yet been designated for publication or reported. The memorandum opinion and order of the United States District Court appears at Appendix B, which has not yet been designated for publication or reported.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals decided my case was January 8, 2007. A timely petition for rehearing was denied by the United States Court of Appeals on February 6, 2007, and a copy of the order denying rehearing appears at Appendix C. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Section 703(a)(1) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part: It shall be an unlawful employment practice for an employer . . . to

discriminate against any individual with respect to his ... terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 1981 of 42 U.S.C. provides in pertinent part: (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens.... (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

The Seventh Amendment of the United States Constitution states "[I]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Federal Rule of Civil Procedure ("F.R.C.P.") 56, in relevant part provides that the Court may only enter summary judgment against a party when the pleadings, answers to interrogatories, admissions on file, affidavits, and other evidence submitted to the Court show that "no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law."

Local Rules of United States District Court, Northern District of Illinois 56.1 is attached to Appendix D.

STATEMENT OF THE CASE

Karris Bilal (hereinafter "Employee") is an African-American, who was hired by BP America Inc. – BP Amoco (hereinafter "BP") in 1998 to work in its tax department.[1] In the year of 2000, after BP's merger with Amoco, Employee was transferred under the management of James Dietz's (hereinafter "Dietz").[2]

Prior to Employee being moved under Dietz, Employee received excellent work performance ratings from his previous supervisor, and also received positive work performance feedback from Employee's clients.[3, 4] In addition, prior to Employee being transferred under Dietz, Dietz never had an African-American direct report or Employee that he had written a performance review on during Dietz's twenty-four years working for BP.[5]

Employee was the only African-American tax attorney employed by BP in the entire United States of America, and the only person that Dietz had placed on probation during his twenty-four years working for BP.[6] Employee

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[1] Plaintiff's dep. Vol. 5 of 6, p. 30, lines 16-19.

[2] Dietz dep. Vol. 6 of 6, p. 17, lines 12-16.

[3] Plaintiff's dep. Vol. 5 of 6, p. 111, lines 21-24 and p. 112, lines 1-4.

[4] Dietz dep. Vol. 6 of 6, p. 54, lines 1-24; p. 65, lines 1-17; p. 69; p. 86, lines 7-24 and p. 87, lines 1-17; p. 73, lines 15-24 and p. 74, lines 1-13.

[5] Dietz dep. Vol. 6 of 6, p. 26, lines 12-15; p. 31, lines 8-21 and p. 33, lines 1-10.

[6] Dietz dep. Vol. 6 of 6, p. 83, lines 11-24 and p. 84, line 1.

received substantially less compensation from BP than his non-African-American colleagues, who had less seniority.[7]

May 29, 2001 Meeting between Employee and Dietz

On May 29, 2001, in a personal meeting with Employee, Dietz became frustrated that he was being questioned by Employee regarding Dietz's assertions regarding a special tax election under 338 (h)(10) – Employee informed Dietz that he believed Dietz's claimed 338 (h)(10) concerns were really based on the color of Employee's skin – Dietz then lost his composure and told Employee that you just don't get it "boy," we make the decisions here, you don't and if it were left up to him (Dietz), he (Dietz) would not hire any of Employee's kind.[8] After Dietz made the foregoing racial remarks to Employee, Employee informed Dietz that his racial remarks have exposed Dietz to liability and that Employee was going to report Dietz and sue him for what he (Dietz) said to Employee.[9] Dietz then responded to Employee by stating that if Employee caused trouble or reported Dietz, Dietz would destroy Employee's "black ass."[10]

However, Dietz stated in his deposition that he never told Employee that you just don't get it "boy," we make the decisions here, you don't and if it were left up to him (Dietz), he (Dietz) would not hire any of Employee's kind,

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[7] Vol. 1 of 2, index E, pp. 5 of 9 through 8 of 9; Exhibit A-2, PX00392.

[8] Plaintiff's dep. Vol. 5 of 6, p. 254, lines 1-11.

[9] Plaintiff's dep. Vol. 5 of 6, p. 254, lines 12-15.

[10] Plaintiff's dep. Vol. 5 of 6, p. 254, lines 15-16.

or told Employee that if he caused trouble or reported Dietz, or sued he (Dietz) would destroy Employee's "black ass."[11] Yet, the following week, on June 4, 2001, Dietz sent Employee an email – placing Employee on probation, removing Employee from lead contact for the Pipelines Business Unit, and requiring Employee to meet with him weekly, without any prior write-up or explaining exactly why such drastic actions were being taken against Employee.[12] Employee responded to Dietz's email – stating that Employee did not agree with any of the "assertions" made by Dietz in the May 29, 2001 meeting, or the significant improvement areas listed by Dietz in his June 4, 2001 email sent to Employee.[13]

Employee's Work Performance & Lost Employment File

BP has no documentation of Employee's alleged performance deficiency that predates the May 29, 2001 meeting, other than an alleged single subjective performance review made by Dietz.[14] To date, BP still cannot locate Employee's complete employment file – prior to Employee reporting to Dietz.[15] Employee was never informed that he was being terminated for alleged deficient work performance until after Employee filed the subject lawsuit.[16] Dietz

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[11] Dietz dep. Vol. 6 of 6, p. 89, lines 1-17.

[12] Plaintiff's dep. Vol. 5 of 6, p. 263, lines 8-23; Dietz dep. Vol. 6 of 6, p. 89, lines 14-16.

[13] Plaintiff's dep. Vol. 5 of 6, p. 266, lines 2-23.

[14] Dietz dep. Vol. 6 of 6, p. 106, lines 2-25.

[15] Stephanie Tomino dep. Vol. 6 of 6, p. 27, lines 11-24; Exhibit A-3, PX00965, PX00967, PX00968, and PX00970.

[16] Plaintiff's dep. Vol. 5 of 6, p. 315, lines 21-24.

states that his performance review of Employee was based on his (Dietz) subjective beliefs, but Dietz could not specifically describe a single objective factor to support his negative review of Employee's alleged deficient work performance.[17]

However, Employee has provided evidence, which would indicate that his work performance was not deficient.[18] Employee's value added (i.e., BP tax dollar savings – the top measuring device for the tax departments performance) was greater than many of the members in his tax group – and Employee worked on, and completed more projects.[19] Finally, Employee was responsible for reviewing and signing off on the tax returns for more than thirty BP companies.[20]

Although Dietz downplayed the fact that the value-added performance measure was the primary factor to gauge the performance of tax planners, both Larry Lewandowski and William Cariato (two tax planners in Employee's tax group), stated otherwise in their depositions.[21] In fact, value-added is at the top of the list in the Tax Departments Performance Contract, and was of major

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[17] Dietz dep. Vol. 6 of 6, p. 50, lines 9-23.

[18] Exhibit A-1, PX00001-PX00008 and PX00166; Vol. 1 of 2, pp. 76-78.

[19] Exhibit A-2, PX00442-PX00460, PX00415-PX00442; A-1, PX00009-PX00128; A-3, PX00806-PX00908.

[20] Record Vol. 1 of 2, pp. 70-73.

[21] Lewandowski dep. Vol. 6 of 6, p. 32, lines 18-20 and Cariato dep. p. 69, lines 13-16, lines 19-21; p. 79, lines 15-17.

importance in Dietz's correspondence to the tax group during Employee's employment with BP.[22]

Dietz's Continued Actions against Employee after May 29, 2001

Employee considered the individuals in his group, with the exception of Dietz, to be nice people and never accused any of them of any type of discrimination.[23] Dietz continued to discriminate and retaliate against Employee throughout his employment with BP, including among other things, failing to notify Employee of important tax group meetings.[24] Moreover, although the members of Employee's tax group were all located in enclosed offices near each other, Dietz chose to place Employee in a cubical on the opposite side of the building, away from his group, and then posted the seating chart for everyone to view.[25]

In the affidavit of Dietz, Larry Lewandowski, and William Cariato (three white non-attorneys), in support of BP's motion for summary judgment, all stated that Employee (an attorney, with an LL.M. in Taxation), in their opinion, did not have a firm understanding of a simple concept, like basis.[26] Indeed, Larry Lewandowski did not report any of the now alleged performance deficiencies to Dietz until after he became aware of this action filed by

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[22] Exhibit A-1, PX00213-PX00219; Exhibit A-3, PX00751-PX00752, PX00956 and PX00971-PX00972.

[23] Plaintiff's dep. Vol. 5 of 6, p. 267, lines 20-24 and p. 268, lines 1-4.

[24] Plaintiff's dep. Vol. 5 of 6, p. 272, lines 2-24.

[25] Exhibit A-3, PX0094.1.

[26] Record Vol. 5 of 6, Tab 1, 3, and 4.

Employee against BP from Dietz.[27] And, although Dietz asserts in his affidavit that he has never received any negative feedback from colleagues and clients of Ravi (another employee in the tax group), regarding Ravi's performance deficiencies, Dietz stated the opposite in his deposition.[28]

BP's Investigation of Employee's Discrimination

Stephanie Tomino (BP's HR manager) stated that she investigated Employee's discrimination claim. More precisely, Tomino stated in her deposition that during her investigation she relied on conversations with Dietz and Lewandowski to support the fact that the quality and quantity of Employee's work performance was deficient.[29] However, Larry Lewandowski stated in his deposition that he did not know who Stephanie Tomino was, and that neither Tomino nor Denise Lugo (HR) interviewed him about Employee, or discussed with him what Employee did or how he performed for BP.[30] BP concluded its investigation, which essentially consisted of discussions with Dietz, then informed Employee that BP had found no discrimination, and directed Employee to return to work under Dietz.[31]

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[27] Lewandowski dep. Vol. 6 of 6, p. 78, lines 2-24.

[28] Dietz dep. Vol. 6 of 6, p. 124, lines 5-11.

[29] Tomino dep. Vol. 6 of 6, p. 73, lines 16-24; p. 74, lines 1-5.

[30] Lewandowski dep. Vol. 6 of 6, p. 80, lines 1-15.

[31] Tomino dep. Vol. 6 of 6, p. 73, lines 9-24 and p. 74, lines 1-5.

Employee's Treatment by Dr. Jeffrey Santee

Dr. Jeffrey Santee is a licensed clinical psychologist, who treated Employee for his severe anxiety and depression related to his work environment.[32] On October 15, 2002, Dr. Santee wrote a letter regarding his treatment of Employee, and his professional opinion that Employee should not return to the same work environment under Dietz.[33] Accordingly, Employee informed BP that he would not return to work under Dietz, and would be applying for short-term disability.[34]

Dr. Santee stated that he never had any concerns with the veracity of Employee, including the discussions with Dr. Santee regarding the racial statements made by Dietz on May 29, 2001 – Dr. Santee also stated that it was not out of the question for Employee not to reveal the statements earlier because of embarrassment and fear.[35] Moreover, Dr. Santee stated that Employee not revealing the racial statements by Dietz immediately was explainable, in that, Employee feared his name being tarnished in the professional community, Employee was a private person, and Employee's reaction to the racial statements by Dietz was emotional.[36]

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[32] Dr. Santee dep. Vol. 6 of 6, p. 7; Exhibit A-3, PX00957.

[33] Record Exhibit A-3, PX00957.

[34] Record Exhibit A-3, PX00969.

[35] Dr. Santee dep. Vol. 6 of 6, p. 124, lines 1-10.

[36] Dr. Santee dep. Vol. 6 of 6, p. 108, lines 13-24; p. 109, lines 4-13; p. 114, lines 20-21; p. 112, lines 9-19; p. 114, lines 2-7 and 20-21; p. 122, lines 1-5; and p. 124, line 23.

BP Fires Employee and Supplies Three Shifting Disparate Reasons To Justify Employee's Termination

On December 10, 2002 (approximately two months after Employee applied for short-term disability), BP sent Employee a letter, which stated that, as Dietz previously notified Employee in July 2002 (approximately six months prior), Employee's employment would be terminated beginning January 1, 2003.[37]

BP has supplied three vastly different reasons to justify Employee's discharge, including (1) downsizing, (2) poor work performance, and later (3) Employee failing to return to work after reporting Dietz's discrimination and taking short-term disability upon his doctor's advice.[38] Although Dietz stated that Employee was being discharged for his deficient work performance, Dietz never changed any of Employee's duties or work responsibilities as a tax planner; Employee continued as lead tax contact on all of his projects (many multi-million dollar deals) until his separation date.[39] In addition, BP Human Resources Department had no knowledge that Dietz was going to discharge Employee at the end of 2002.[40]

BP alleges that a meeting in Seattle was held in July 2002, in which Employee was selected to be terminated, but BP states that no one in attendance at the meeting

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[37] Record Exhibit A-3, PX00963.

[38] Plaintiff's dep. Vol. 5 of 6, p. 315, lines 6-18; Dietz affidavit, Vol. 1 of 6, Tab 1; Tomino's dep. Vol. 6 of 6, pp. 69-70.

[39] Dietz dep. Vol. 6 of 6, p. 89, lines 18-24; p. 90, lines 7-24; p. 91, lines 1-21.

[40] Dietz dep. Vol. 6 of 6, p. 92, lines 1-9.

has any notes or minutes from this meeting, and that BP's own Human Resources department was not notified that Employee would be terminated – although Dietz claims that he made a note of the meeting to himself and verbally told Employee.[41] Dietz attended the alleged meeting in Seattle, and recommended that Employee's employment with the company be terminated.[42]

Relevant Procedure

On December 22, 2003, Employee filed this action under the Civil Rights Act of 1964, as amended by the Civil Rights Acts of 1991, 42 U.S.C. §§ 2000e et seq., and the Reconstruction-era Civil Rights Act, 42 U.S.C. § 1981, for the redress of unlawful employment discrimination by BP and Dietz.

On January 12, 2006, the district court entered a Memorandum Opinion and Order granting the Respondents summary judgment, finding the racial epithets and Dietz referring to Employee as "boy" as stray remarks. On January 8, 2007 the United States Court of Appeals affirmed the district court, turning a blind eye to the racial remarks made by Dietz, including Dietz referring to Employee as "boy" and telling the Employee that if he caused trouble or reported Dietz, he would destroy Employee's "black ass." On February 6, 2007 the United States Court of Appeals denied Plaintiff's timely petition for rehearing.

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[41] Dietz dep. Vol. 6 of 6, p. 95, lines 4-24.

[42] Dietz dep. Vol 6 of 6, p. 96, lines 9-12.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS ARE IN CONFLICT AND IN CONFLICT WITH DECISIONS OF THIS COURT ON THE IMPORTANT QUESTION OF HOW DISCRIMINATORY REMARKS ARE HANDLED IN EMPLOYMENT DISCRIMINATION CASES

This writ is intended to direct this Court's attention to an important and deep scar on America's history dating back to slavery – a time when African-Americans were shackled physically – to after the Civil War when new devices were imposed to keep African-Americans in their place, e.g., Jim Crow. During slavery and throughout the Jim Crow era, adult African-American males would be referred to as boy, as well as other demeaning and derogatory words. For example, in *Why We Can't Wait*, pp. 13-14 (*First Signet Classic Printing*, January 2000), Martin Luther King, Jr. said many white people would tell you "I discussed this frankly with the colored boy who works for us and I told him to express himself freely. He said . . . " – and that no cook would dare tell his or her employer what he ought to hear, because he or she knew that the penalty for speaking the truth could be the loss of his or her job, or life. *Id.*

Historically, the term "Boy" derives its origins from the slave era, and was particularly used to refer to the black male slave in the United States and England. *Oxford English Dictionary*, p. 260 (Compact ed. 1971). Indeed, even after African-Americans were freed from slavery, the custom and practice of addressing African-American men as "boy" continued among many whites as a method of asserting the social, legal and racial inferiority of African-Americans. Moreover, the usage of the term "boy"

was generally utilized to intimidate, or accost an African-American male who was doing something objected to by whites. *Id.*

The civil rights movement was not only concerned with ending racially discriminatory practices, but also sought to end the widespread and often casual use of racial epithets by whites. As an illustration, Dr. Martin Luther King Jr. recounted one of his childhood experiences when his father was referred to as a "boy" – stating that a policeman pulled over the car driven by his father and said: "All right, boy, pull over and let me see your license." His father replied to the police officer, "I'm no boy." And, then his father pointed to him and said "This is a boy. I am a man, and until you call me one, I will not listen to you." James Washington, ed., *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.*, pp. 420-21 (1986).

Today, (as apparent from the public outrage regarding the Don Imus "nappy-headed hos" remarks, and the Michael Richards racist tirade) "[t]he use of 'boy' to a black American adult now would be considered offensive. This is known to the white speakers who continue to use the term, so that 'boy' in such circumstances must be counted as a positive insult." Leslie Dunkling, *A Dictionary of Epithets and Terms of Address*, 57 (1990). Accordingly, there is no place in our civilized society today for racial epithets, including the term "boy" – when referring to an adult African-American male.

However, several of the lower court cases demonstrate the conflicting ways in which the racially derogatory term "boy" is handled. For example, in *Ladner v. State*, 868 S.W. 2d 417, 420 (Tex. Ct. App. 1993), a police officer stated to a black prisoner "Sit down, boy," then beat him to death. In

Clark v. Claremont University Center and Graduate School, 6 Cal. App. 4th 639, 648, 8 Cal. Rptr. 151, 155 (Ct. App. 2d Dist. 1992), a white department chairman during a dinner party referred to an African-American as "boy" when asking for him to pass the dinner rolls. In *Pittman v. King's Command Foods, Inc.*, 2003 WL 22073077 at *7 (Wash. App. Div. 1 Sept. 8, 2003), a white supervisor stated to an adult African-American male, "Boy, you do not have any rights, we are a multimillion dollar company and there is nothing you can do to hurt us as long as you are an employee, you will do what we say, when we say it."

Nevertheless, despite the historical pain inflicted and the current negative public opinion regarding the reprehensible use of the racial epithet "boy," the Seventh Circuit Court of Appeals, in this case, has essentially embraced the use of the term "boy" and other racial epithets used in the work place by providing that, summary judgment is proper despite the presence of evidence that a white decision-maker addressed an adult African-American male Employee as "boy" and then told the African-American Employee that if it were left up to him (i.e., the white decision-maker), he would not hire any African-Americans, and that if the African-American Employee caused trouble or reported the white decision-maker, the white decision-maker would destroy the African-American Employee's "black ass."

This conflicting position taken by the Seventh Circuit is not merely wrong, but quite frankly – baffling. More precisely, the Seventh Circuit's position in the instant case directly conflicts with two decisions of this Court. First, the Seventh Circuit's position totally disregards this Court's holding in *Anthony Ash and John Hithon v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006) (holding that while the use of the term "boy" alone may not by itself always be

evidence of discrimination, certain factors must be considered to determine the meaning of the term "boy" including the context, inflection, tone of voice, local custom, and historical usage). Presumably, when an Employee properly demands a jury trial, the Employee's Seventh Amendment Constitutional rights will be honored, which means that these questions of fact concerning context, inflection, tone of voice, local custom, and historical usage will be determined by the trier of fact – the jury, rather than determined and disposed of in a summary judgment. Secondly, this Court in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151-53 (2000), emphasized the importance of conduct revealing discriminatory attitudes by the decision-maker preceding the challenged decision. More precisely, this Court held that such conduct was important evidence, even though (unlike the facts in the case at bar, in which the racist remarks were in fact made by a decision-maker) not made in the direct context of the challenged firing. *Id.* at 152-53.

The Seventh Circuit's holding here also conflicts with decisions in numerous other courts of appeal. For example, the Fourth Circuit correctly described "boy," when used to describe or address an adult African-American male, as "racially derogatory." *White v. BFI Waste Services, LLC*, 375 F.3d 288, 297-98 and n.6 (4th Cir. 2004); *Holland v. First Virginia Banks, Inc.*, 1991 WL 125642 at *1 (4th Cir. July 12, 1991). Similarly, the Sixth Circuit acknowledges that the use of "boy" is "disrespectful and racist." *Craig v. Ohio Department of Administrative Services*, 1993 WL 303374 at *4 (6th Cir. Aug. 9, 1993). The Eighth Circuit has recognized the actions of a white supervisor, who called an African-American male subordinate "boy" as "clearly offensive." *Elmahdi v. Marriott Hotel Services, Inc.*, 339

F.3d 645, 653 (8th Cir. 2003). In *King v. City of Eastpointe*, 86 Fed. Appx. 790 (6th Cir. 2003), the Sixth Circuit recognized and emphasized the evidentiary importance of the term "boy," when several African-American youths were stopped and mistreated by police, and alleged they had been targeted because of their race. Similar to this case, the district court awarded summary judgment, finding that there was no evidence of any racial motive. However, unlike in the case at bar, the Sixth Circuit Court of Appeals reversed, holding that evidence that one officer had addressed a plaintiff as "boy" was sufficient to support the claim of racial motive, and thus, precluded the granting of summary judgment. *Id.* at 802; see also *id.* at 814 (Moore, J., concurring) (providing use of the term "boy" is a "racial epithet."); see *Taylor v. Jones*, 653 F.2d 1193, 1199 (8th Cir. 1981) (where the term "boy" contributed to a "pervasive atmosphere of prejudice.") In addition, the use of the term "boy" was identified as one of the forms of verbal abuse in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). *Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008, 1013 (9th Cir. 2000).

Indeed, state courts have also recognized the racially offensive meaning of the epithet "boy." See *Sumner v. Goodyear Tire & Rubber Co.*, 427 Mich. 505, 398 N.W. 2d 368 (1986) (where the Michigan Supreme Court recognized the term "boy" to be a "racially derogatory nam[e]." In *Tate v. State*, 784 So. 2d 208 (Miss. 2001), a white defendant had been convicted of assaulting various individuals, (of which most of them were African-American), and at the time of the trial, the prosecution presented evidence that Tate during that time had referred to a black Deputy Sheriff as "boy." 784 So. 2d at 213. Consequently, the Mississippi Supreme Court labeled that remark as a

"racial slur." 784 So. 2d at 214. Accordingly, the state Supreme Court reversed Tate's conviction because the evidence of his use of the racial epithet "boy" as well as other racial remarks prejudiced the case, which was tried in front of a racially mixed jury. 784 So. 2d at 215.

Here, in this case, the district court labeled as "stray remarks" a white decision-maker's remarks addressing an adult African-American male Employee as "boy" and then telling the African-American Employee that if it were left up to him, he (the white decision-maker) would not hire any African-Americans, and that if the African-American Employee caused trouble or reported the white decision-maker, he (the white decision-maker) would destroy the African-American Employee's "black ass." The Seventh Circuit has turned a blind eye to the foregoing racially charged remarks by the decision-maker – and failed to consider the foregoing racist remarks as direct evidence or mixed motive. In *Thomas v. First Nat'l Bank*, 111 F.3d 64, 66 (8th Cir. 1997) (quoting *Kriss v. Sprint Communications Co.*, 58 F.3d 1276, 1282 (8th Cir. 1995)) "direct evidence" was defined as "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the factfinder to find that that attitude was more likely than not a motivating factor in the employer's decision." In addition, in *Delph v. Dr. Pepper Bottling Co.*, 130 F.3d 349, 352 (8th Cir. 1997), the court recognized the term "black boy" as a racial slur.

As a result of the lower courts not having precise guidance on how the term "boy" and other racial and discriminatory epithets should be handled, there exist an important conflict in the circuit courts, which results in slurs like "boy" and other racially charged epithets being erroneously

labeled as "stray remarks" – which leads to more conflicting and unhelpful decisions in the circuit courts, and endless evidentiary concerns, which burdens not only the lower courts, but this Court. For example, some courts have considered the context in which the remark was made to determine whether a statement is a stray remark. *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir. 1998). However, the Third Circuit, in *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 132 (3d Cir. 1997), cert. denied, 522 U.S. 1116 (1998), identified several factors that should be considered when determining whether a stray remark made by someone outside the employer's decision-making process may "constitute admissible evidence of managerial atmosphere and a possible discriminatory intent." *Id.* at 133 (citing *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506 (3d Cir. 1997)) (including "the declarant's position in the corporate hierarchy, the purpose or content of the statement, and the temporal connection between the statement and the challenged employment action.") *Id.* at 133. Indeed, so called "stray remarks" have caused a myriad of evidentiary concerns and motions *in limine* pursuant to Rule 403 of the Federal Rules of Evidence. See *Rifkinson v. CBS Inc.*, 1997 U.S. Dist. Lexis 15865 (S.D.N.Y. 1997) (where the Court granted a defendant's motion *in limine* to preclude a manager's remarks referring to women as "girls" and men as "boys" – the Court found that the statements were inadmissible because the person who made the statement was not involved in the decision making, and therefore, the evidence lacked probative value.).

In addition, the circuit courts are in conflict regarding how connected a racially charged statement must be – to the employment decision – to avoid being labeled as a

"stray remark" – and accordingly, summarily dismissed as not evidence of discrimination. In the First Circuit the statement or action must have a clear connection to the employment decision. *McMillan v. MSPCA and Dr. Gus Thornton*, 140 F.3d 288, 301 (1st Cir. 1998) (providing that although stray remarks may be relevant to pretext, "their probativeness is circumscribed if they were made in a situation temporally remote from the date of the employment decision, or if they were not related to the employment decision in question, or if they were made by nondecisionmakers."). In *McMillan v. MSPCA and Dr. Gus Thornton*, the court held that "various unprofessional remarks to women with whom he worked" made by the president of the company "may have been relevant and probative as to Dr. Thornton's motivation in setting the salaries of male and female department heads, in the sense that they evince a derogatory attitude towards women." *Id.*

However, the Second Circuit when confronted with the same issue regarding how to treat biased remarks found that statements made by one of a company's decisionmakers could not be considered stray remarks when they revealed that youth was, and would likely continue to be, an important factor in the company's determination of the makeup of its sales force. *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 162-63 (2d Cir. 1998) (providing that statements such as "You better watch your ass. If you look around, you see all young people," were made by a sales manager, officer, and director of the company, and at least one of the statements was made on behalf of the company's president.) At least some courts in the Third Circuit admit as evidence stray remarks without the strict connection between the statement and the employment decision, if the statements

"could be viewed as evidencing a discriminatory attitude, made by a decision-maker, at the time plaintiff was terminated." *O'Neill v. Sears, Roebuck and Co.*, 108 F. Supp.2d 433, 437 (E.D. Pa. 2000) (Hart, Mag. J.) (emphasis added). Moreover, some courts within the Third Circuit have held that if the statement reflects a discriminatory animus and directly reflects on the challenged employment decision, it cannot be said that such statement is a mere stray remark. For instance, in *Clancy v. Preston Trucking Co.*, 967 F. Supp. 806 (D. Del. 1997), when a supervisor made a statement referring to the plaintiff as "older than dirt," that statement was not considered a mere stray remark because it was related to the supervisor's statement that he intended to make her quit. See *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344 (3d Cir. 1999) (where the court found that alleged discriminatory statements by the company chairman, where he referred to women as less dependable than men were merely stray remarks, which are "rarely given great weight, particularly if they were made temporally remote from the date of the decision.") However, in *Brewer v. Quakerstate,* 72 F.3d 326, 333 (3d Cir. 1995) although the statements were made by a nondecision-maker almost two years before the Employee had been terminated, the court held that the statement should not be excluded from evidence because the statement might provide evidence of a discriminatory corporate culture.

In the Fourth Circuit the court held that a co-worker's statement regarding how he could not work for a woman, although derogatory, was a stray remark – lacking an adequate nexus with the adverse employment action. *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999) (providing that while "[d]erogatory remarks

may in some instances constitute direct evidence of discrimination, . . . Title VII was not designed to create a federal remedy for all offensive language in the workplace" and generally must be related to the employment decision in order to be relevant) (internal quotations and citations omitted). However, the Fifth Circuit has held that "stray remarks" can provide sufficient evidence of discrimination if they are "1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue." See *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 405 (5th Cir. 2001). The Sixth Circuit in *Tooson v. Roadway Express, Inc.*, 47 Fed. Appx. 370, 375 (6th Cir. 2002) did not find that the district court erred in its jury instruction, in that, unless the plaintiff has shown the remarks were made by an employment decision-maker, "you are not to consider any stray remarks, comments, or characterizations in your deliberations." The Sixth Circuit further held that in order for biased statements to be considered admissible evidence of discriminatory intent, "the jury is required to find that the statement was that of a decisionmaker." *Id.*

The Seventh Circuit has defined a stray remark as "a remark which fails to show discrimination unless it is related to the employment decision." *Gorence, Wolf, and Bruce v. Eagle Food Centers, Inc.*, 242 F.3d 759, 762 (7th Cir. 2001) (however, surprisingly, the court also has found (in cases other than the case at bar) that stray remarks of a derogatory character can be admissible as evidence of discrimination "when the decision makers themselves, or those that provide input into the decision, express such feelings (1) around the time of, and (2) in reference to, the

adverse employment action complained of.") In *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1315 (8th Cir. 1996), the Eighth Circuit considered biased remarks made by the vice-president and an admissions supervisor as "stray remarks," – providing that despite the positions of these individuals the biased comments were considered "stray remarks" because neither of the individuals was involved in the decision to terminate the Employee. *Id.* at 1316. See also *Kneibert v. Thomson Newspapers*,129 F.3d 444, 454 (8th Cir. 1997) (providing that a statement was a stray remark because it was made by an Employee, who had no decision-making authority – therefore, the court affirmed summary judgment.) However, the same court has held that even when the decision-maker's remarks are not directly related to the decision-making process, such statements are more than mere stray remarks if they reflect a discriminatory animus. As an illustration, the Eighth Circuit found that an immediate supervisor's statements "that white boy better learn who he's messing with, he better get his act together" were indeed more than mere stray remarks – although such statements were not directly related to the decision to terminate the plaintiff, they did reflect the real discriminatory attitude. See *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 633, 634 (8th Cir. 1997) (providing that an employer's statements reflected an awareness of the Employee's race and demonstrated a "decidedly negative attitude toward [white] people on the part of [a person] responsible for [the employment decision].") *Browning* at 635 (quoting *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 924 n.6 (11th Cir. 1990)); see *Delph v. Dr. Pepper Bottling Co.*, 130 F.3d 349, 352 (8th Cir. 1997) (where "black boy" was recognized as a racial slur); see also *Alton Packaging Corp.*, at 923-925 (providing that where the

statement was made by a person responsible for promotions that "if it was his company, he wouldn't hire any black people" amounted to "direct evidence"). Also, in *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993), documents that contained statements by the company president identifying the presence of young managers as a company strength, constituted evidence of aged based discriminatory animus. Likewise, in *Morse v. Southern UNY Co.*, 174 F.3d 917 (8th Cir. 1999), the company president made discriminatory remarks, and then reminded his supervisors that they were free to fire Employees. Although the company president was not directly involved in the decision-making process leading up to the firing, his comments did in fact have a significant impact on the termination decisions made by his supervisors – therefore, the statements were considered probative of discrimination because they could reflect a biased corporate culture. *Id.* However, in *Kriss v. Sprint Communication*, 58 F.3d 1276 (8th Cir. 1995), the Court held that an immediate supervisor's statement that certain sales representatives were not ready to "run with the stallions" was deemed a stray remark – the Court found that the remark did not reflect a discriminatory attitude and was unrelated to the decisional process.

The Ninth Circuit simply provides that "if a remark is unrelated to the decisional process, then it is insufficient to show discrimination," and therefore, should be treated as a stray remark. *Harris v. Itzhaki*, 183 F.3d 1043, 1055 (9th Cir. 1999). However, it must be noted that in that case, the court did find that the agent's statement that "the owners don't want to rent to blacks" was not a "stray remark," because of her agency relationship with the owners, who were in fact the ultimate decision-makers.

Godwin v. Hunt Wesson, Inc., 150 F.3d 1217 (9th Cir. 1998) (confusingly, provided that a comment may be considered a "stray remark" if uttered in an ambivalent manner and not directly tied to the plaintiff's termination). The Tenth Circuit, on the other hand, has held that "isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions." *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000) (providing that a plaintiff must demonstrate a nexus exists between the allegedly discriminatory statement and the company's termination decision, and thus, age did in fact play a role in the defendant's decision-making process, and influenced the outcome. *Id.* Finally, the Eleventh Circuit holds a relatively restrictive view of the probative value of statements that might be considered stray comments. For instance, in *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 924 (11th Cir. 1990) the court held that where a white applicant did not apply for a position until after the decision-makers had determined a black Employee was not qualified, relative qualifications would not establish a non-discriminatory reason.

In conclusion, historically, federal courts, and particularly this Court have served as the moral conscience for society when America has screamed out for clarity and guidance regarding assistance with carving out the cancer of racism and discrimination that is prevalent in our society. This Court has previously served as that moral conscience when it unanimously, boldly declared that separate was indeed inherently unequal in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Again, today, this Court is desperately needed to resolve this important moral question – whether there is any place in our civilized society and the work place for offensive, discriminatory

remarks like referring to an adult African-American male, as a "Boy" – or telling an African-American male at the work place that if it were left up to a white decision-maker he would not hire any African-Americans – or that if the African-American Employee caused trouble or reported the white decision-maker, the white decision-maker would destroy the African-American Employee's "black ass."

In any case, this Court should grant this writ to resolve the foregoing split in the circuit courts regarding the conflicting and unhelpful decisions by the circuit courts – relative to how discriminatory and so called "stray remarks" are handled in the work place. In addition, the granting of this writ is warranted because the Seventh Circuit's holding, in the case at bar, has significantly departed from the accepted and usual course of judicial proceedings, and sanctioned the same departure by lower courts, which presents this Court with the type of exceptional circumstance that justifies the exercise of this Court's supervisory power over the lower federal courts.

II. THE COURT SHOULD GRANT THIS WRIT TO RESOLVE THE IMPORTANT RECURRING QUESTION UNRESOLVED BY THIS COURT'S HOLDING IN *ASH v. TYSON* REGARDING BY WHOM SHOULD ALLEGED DISCRIMINATORY REMARKS BE CONSIDERED TO DETERMINE THE CONTEXT, INFLECTION, TONE OF VOICE, LOCAL CUSTOM, AND HISTORICAL USAGE

Simply put, this Court held in *Anthony Ash and John Hithon v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006) that while the use of the term "boy" alone may not by itself always

be evidence of discrimination, certain factors must be considered to determine the meaning of the term "boy" (and presumably other alleged discriminatory remarks), including the context, inflection, tone of voice, local custom, and historical usage. Obviously, the context, inflection, and tone of voice of alleged discriminatory remarks, such as "boy" cannot be ascertained without someone observing and determining how these statements are being made. Therefore, the question becomes whether when an Employee demands trial by jury, can the Court decide genuine issues of material fact concerning discriminatory statements in a summary judgment, or should these determinations be made by the trier of fact – the jury. Logically, it would not make much since for an Employee to properly make a jury demand (as guaranteed by the Seventh Amendment of the U.S. Constitution), if the lower courts are allowed to decide the genuine issues of material fact (by any vehicle), grant a summary judgment to the defendants, and thereby preclude the trier of fact (i.e., the jury) from ever hearing and determining a single genuine issue of material fact. Then, even worse, an Employee gets slapped with thousands of dollars in cost payable to the very individuals who have discriminated against the Employee. Indeed, this writ presents this Court with the perfect opportunity to act boldly and to resolve the continuing ambiguity and unjust results being reached in the circuit courts – relative to the lower courts' treatment of racist and discriminatory remarks in the work place. Surely these issues are too important to be ignored in a proper functioning, civilized society, and the resolution of these important issues will strengthen the intended deterrent effect of Title VII, which is being watered down more and more each day – to a point of legislative worthlessness.

CONCLUSION

For all of the foregoing reasons, this Court should grant this petition for a writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted,

Karris Bilal
Petitioner

KARRIS BILAL
150 N. Michigan Avenue
Suite 2800
Chicago, Illinois 60601
(312) 624-7709

Dated: May 6, 2007

2007 WL 186242

APPENDIX A

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued December 13, 2006
Decided January 8, 2007

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 06-1951

KARRIS BILAL,
Plaintiff-Appellant,

v.

BP AMERICA, INC. and JAMES DIETZ,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 03 C 9253

John W. Darrah,
Judge.

ORDER

BP American, Inc. (BP), dismissed Karris Bilal, an African-American employee, and Bilal turned around and sued the company and his former supervisor, James Dietz,

under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981, alleging race discrimination and retaliation. The district court granted summary judgment for the defendants, determining that Bilal failed to make a prima facie case on either claim and also failed to show that BP's stated reason for his dismissal was pretextual. Bilal appeals, but as far as we can tell from his brief, the original retaliation claim is not presented.

In 1998 Bilal began working as a tax attorney at Amoco, which later merged with BP. In 2000 and 2001 several colleagues expressed concerns about Bilal's competence to his supervisor, Dietz. Dietz eventually put Bilal on probation in May 2001. More than a year later, eight managers collectively decided, after reviewing Bilal's performance and long-term career prospects, that his employment would end on December 31, 2002.

Bilal filed a complaint in federal court alleging that in May 2001 Dietz made racially disparaging remarks. According to Bilal, Dietz told him: "If it was left up to me, I wouldn't hire any of your kind;" "You don't know who you're messing with, boy;" and "If you cause trouble, I will destroy your black ass."

After the parties engaged in discovery, the defendants filed a motion for summary judgment, accompanied by a N.D. Ill. Local Rule 56.1 statement of material facts. Bilal (who was represented by counsel in the district court proceedings) opposed the motion and filed a response, but it did not comply with the requirements of Rule 56.1. He neither admitted nor denied the defendants' facts but instead refuted them by presenting additional facts of his own. He subsequently filed an amended response, but it

also did not comply with Rule 56.1. In denying the defendants' facts, he once again improperly proposed his own additional facts rather than presenting them in a separate section.

The district court ignored Bilal's proposed statements and deemed admitted the facts in the defendants' statement. The court determined (along with other findings not challenged on appeal) that Bilal failed to make out a case of race discrimination under the indirect method established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04 (1973), because he could not satisfy the "meeting performance expectations" or "similarly situated" prongs, and he could not show that the proffered reason for his discharge – poor performance – was pretextual. The district court granted summary judgment to the defendants and, as authorized by F.R.C.P. 54(d), awarded $5040.59 in costs. No attorneys' fees were included in this award, which the district court resolved in a four-page order.

It is well settled that a district court may ignore alleged "facts" that fail to comply with the court's summary judgment procedures. And a court may then deem the opposing party's facts admitted. *See* Local Rule 56.1(b)(3)(C); *Ammons v. Aramark Uniform Services, Inc.,* 368 F.3d 809, 817 (7th Cir. 2004); *Smith v. Lamz,* 321 F.3d 680, 683 (7th Cir. 2003). Bilal's brief refers in passing to the district court's "misapplication" of rule 56.1, but he does not argue that his proposed statements of fact complied with Rule 56.1, nor does he argue that – his failure to comply with the rule notwithstanding – the district court abused its discretion by ignoring his submissions. Therefore, we review the grant of summary judgment on the record as defined by the defendants' statement of facts.

First, Bilal argues generally that he presented sufficient evidence to make out a case of race discrimination under the indirect method of proof. But in making this argument, he ignores the defendants' proposed facts, which he constructively admitted, and which establish (1) that Bilal's supervisor and several of his colleagues harbored concerns about his knowledge of tax law, (2) that Bilal received at least two unfavorable performance reviews, and (3) that he was on probation for more than a year before he was terminated. Bilal cannot argue in the face of these admissions that he was meeting BP's expectations, nor can he show that their stated reason for firing him – poor performance – was a "deliberate falsehood." *See Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 419 (7th Cir. 2006). Also, Bilal's only support for his argument that he could satisfy the "similarly situated" requirement for discrimination claims consists of facts that are outside the record. As such, we cannot take them into account. *See Cichon v. Exelon Generation Co., L.L.C.*, 401 F.3d 803, 810 (7th Cir. 2005).

Bilal also contests, in a one-sentence argument, the district court's order requiring him to pay statutory costs pursuant to F.R.C.P. 54(d). He argues that awarding costs to BP is unfair because BP "gross[es] more than 16 billion dollars a year," but it would have been an abuse of discretion for the district court to deny costs to the defendants based solely on the relative wealth of the parties. *See Mother and Father v. Cassidy,* 338 F.3d 704, 710 (7th Cir. 2003) (holding that under Rule 54(d), costs *must* be awarded to a prevailing party unless that party engaged in misconduct or the losing party is indigent). Bilal also argues that requiring employees to pay employers' costs will deter Title VII litigation, but our longstanding rule is

that "Title VII carved out no blanket exception from Rule 54(d)." *Delta Air Lines, Inc. v. Colbert,* 692 F.2d 489, 490 (7th Cir. 1982).

Although we construe their filings liberally, pro se litigants still must comply with Fed. R. App. P. 28(a)(9) which requires that an appellant's brief contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." *See Anderson v. Hardman,* 241 F.3d 544, 545 (7th Cir. 2001). The remainder of Bilal's arguments- that granting summary judgment to the defendants violated the constitution and conflicted with some sort of "clear congressional right" created by Title VII, and that he presented sufficient evidence to make out a race discrimination case under the direct method – are forfeited because they are undeveloped, unsupported by legal authority, and are not responsive to the district court's analysis.

We therefore affirm the district court's decision.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

(Filed Feb. 14, 2007)

Dates: January 8, 2007

BEFORE: Honorable WILLIAM J. BAUER, *Circuit Judge*
Honorable RICHARD A. POSNER, *Circuit Judge*
Honorable TERENCE T. EVANS, *Circuit Judge*

No. 06-1951

KARRIS BILAL,
Plaintiff-Appellant

v.

BP AMERICA, INCORPORATED,
a Delaware Corporation and JAMES DIETZ,
Defendants-Appellees

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 03 C 9253, John W. Darrah, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

2006 WL 83445

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KARRIS BILAL,	)	
Plaintiff,	)	**No. 03 C 9253**
v.	)	**Judge John W. Darrah**
BP AMERICA INC. and JAMES DIETZ,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Karris Bilal, filed suit against Defendants, BP America Inc. and James Dietz, alleging race discrimination and retaliation. Presently before the Court is Defendants' Motion for Summary Judgment.

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). All the evidence and the reasonable inferences that may be drawn from the evidence are viewed in the light most favorable to the nonmovant. *Miller v. American Family Mutual Ins. Co.,* 203 F.3d 997, 1003 (7th Cir. 2000). However, the nonmovant must still come forward with evidence establishing the elements of its claim on which it bears the burden of proof at trial. As such, it must establish

specific facts that show there is a genuine issue for trial. *Miller,* 203 F.3d at 1003.

Bilal's response to Defendants' proposed Local Rule 56.1 statement of material facts does not admit nor deny the proposed undisputed facts. Instead, Bilal "agrees" with some of the proposed undisputed facts; and, for others, he neither admits nor denies the proposed statement but includes additional facts of his own. Bilal titled his response to Defendants' Motion for Summary Judgment as including "Additional Facts Which Require Denial of Summary Judgment." However, the only "additional facts" are contained in his "response" to Defendants' properly presented proposed undisputed facts.

Weeks after Defendants' Motion for Summary Judgment was fully briefed, Bilal sought, and was granted, leave to file an amended and supplemental response to Defendants' proposed undisputed facts. Bilal's supplemental responses fail to admit or deny numerous proposed statements of Defendants. For other statements, Bilal "agrees" with the statement then adds additional information. In other statements regarding whether Bilal had performance problems at work, Bilal "acknowledges" the statement is accurate and then denies the substance of the statement with his belief that he was not having any performance problems. Bilal also includes "additional facts" in his supplemental response. However, the supplemental additional statements merely identify those arguments Bilal is presenting in opposition to Defendants' Motion for Summary Judgment, *i.e.,* "Whether Dietz and BP Retaliated against Plaintiff."

Local Rule 56.1(b) requires a party opposing a motion for summary judgment to file:

> (3) a concise response to the movant's statement that shall contain:
>
> (A) a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon, and
>
> (B) a statement, consisting of short numbered paragraphs, of any additional facts that require denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon.

The district court is entitled to strict compliance with Local Rule 56.1. *See Ammons v. Aramark Uniform Serv., Inc.,* 368 F.3d 809, 817 (7th Cir. 2004); *Bordelon v. Chicago School Reform Board of Trustees,* 233 F.3d 524, 527 (7th Cir. 2000) (strict compliance with the local rules governing summary judgment is upheld given the importance of local rules that structure the summary judgment process); *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs"). Because Bilal failed to properly dispute any of Defendants' proposed statements of fact, the facts are deemed admitted. Bilal's "additional facts" are not considered because they are not presented in compliance with Local Rule 56.1(b)(3)(B).

BP America is an energy company that supplies oil, gas, and renewable energy sources to customers throughout the United States. (Def.'s 56.1(a)(3) Statement ¶ 3). James Dietz is employed by BP as Head of Tax – U.S. Refining and Marketing. Dietz held this position during the relevant times of the present suit and supervised Bilal. (Id., ¶ 4).

Bilal, an African-American, was employed with Amoco Corporation in the Fall of 1998 as a Tax Attorney. (Def.'s 56.1(a)(3) Statement ¶ 4). Amoco merged with BP in early 2000, and Bilal began reporting to Dietz as a Tax Attorney in the BP Downstream Income Tax Group. (Id., ¶ 7). Dietz assigned Bilal to act as the primary contact for BP Pipelines, the business that oversees the transportation of crude oil and natural gas by pipelines. (Id., ¶ 8).

As Dietz interacted with Bilal in 2000, Dietz became increasingly concerned that Bilal's knowledge of tax law and business issues was insufficient. (Def.'s 56.1(a)(3) Statement ¶ 9). Dietz also received negative feedback regarding Bilal from others in the Tax Department after they attended presentations by Bilal or worked on projects with Bilal. (Id., ¶ 10). In an attempt to provide Bilal with additional support, Dietz assigned two of Bilal's co-workers, Larry Lewandowski and Bill Cariato, to work with Bilal. Lewandowski and Cariato had been in the Tax Department since 1984 and 1990, respectively. (Id., ¶ 11). Lewandowski and Cariato separately approached Dietz to express their concerns that Bilal did not have the knowledge or skills necessary to provide competent advice to tax clients. (Id., ¶ 12). In Bilal's performance review for the year 2000, dated March 7, 2001, Dietz wrote, in part:

> Karris needs to continue to obtain a deeper understanding of the [Pipelines] business so that he can present opportunities to the business in a confident manner. As lead planner for this BU, he also needs to better engage the business so that communication lines remain open and Tax is brought into projects as they are initiated and not after the fact.

> Karris has further developed his technical skills through attendance at external seminars in the partnership area. Both external and self-directed study will be continued during 2001. As to personal skills, interim discussions regarding time management have provided improvements, but continued diligence will be required as we move forward.
>
> Karris has used a teamwork approach in his efforts and has worked well with more experienced team members such as Larry Lewandowski on a number of projects. He is encouraged to continue to use the expertise of senior members of the downstream team for his future development.

(Id., ¶ 13).

A few months after Bilal received his review, Dietz received input from Leslie Stulberg, a BP Tax Attorney, regarding Bilal's poor performance on a project. Stulberg told Dietz that Bilal did not familiarize himself with the deal, did not pay attention to the deal's deadlines, did not reach the purchase agreement carefully, and did not analyze the deal's tax issues properly. (Def.'s 56.1(a)(3) Statement ¶ 14). Concluding that his informal efforts to assist Bilal in his job were not sufficient, Dietz met with Bilal on May 29, 2001, to discuss Bilal's performance problems, including: the lack of familiarity with the Pipeline business, the depth of his technical expertise, and his attendance record. During the meeting, Dietz placed Bilal on probation for poor performance and informed Bilal that he would no longer be the primary contact for the Pipeline business. (Id., ¶ 16). Dietz memorialized the meeting with Bilal in an e-mail, in which he confirmed that Lewandowski would be assuming Bilal's role as primary contact to the Pipelines group. Dietz also identified five

areas of Bilal's performance that required immediate improvement: (1) more attention to familiarization with underlying transaction structure, (2) more attention to deadlines, (3) better contact with the business unit, (4) better understanding of the tax implications advice, and (5) adherence to work schedule. (Id., ¶ 17).

Bilal claims that Dietz made the following racial remarks at the meeting: (1) "If it was left up to me, I wouldn't hire any of your kind"; (2) "You don't know who you are messing with, boy. You know we make the decisions here; you don't"; and (3) "If you cause trouble, I will destroy your black ass." (Def.'s 56.1(a)(3) Statement ¶ 28).

Following the May 29 meeting, Dietz met with Bilal on a weekly basis to discuss his work projects and ways that Bilal could improve his performance. (Def.'s 56.1(a)(3) Statement ¶ 18). In early 2002, Dietz prepared Bilal's 2001 performance review. In that review, Dietz noted that Bilal had improved his performance in some areas identified in their May 29 meeting, but Bilal still needed to improve his performance in other areas. (Id., ¶ 19).

On July 18, 2002, the Tax Management Team, the leaders of BP's United States tax function, met in Seattle. Present at the meeting were Dietz; James Nemth, Vice President & General Tax Officer; Paul Wessells, Tax Officer-Upstream; Sam Swisher, Associate General Tax Counsel-Chemicals; Paul Novak, Associate General Tax Counsel; Dale Shrallow, Associate General Counseling, Planning and Litigation; William Mangan, Manager U.S. Tax; and Susan Rogers, Head of U.S. Tax Policy. (Def.'s 56.1(a)(3) Statement ¶ 20). The Team discussed various personnel issues. After reviewing performance and long-term career prospects, the Team decided that three individuals

should be informed that their employment with BP would terminate at the end of the year. These three individuals were Bilal, James Kutilek, and Fred D'Amato. (Id., ¶ 21). Kutilek and D'Amato are Caucasian. (Id., ¶ 22). When Dietz returned from the Seattle meeting, Dietz met with Bilal to inform him that his employment with BP would end by the close of the year. Dietz encouraged Bilal to feel free to search for another job in the upcoming months leading to his separation. (Id., ¶ 23).

On September 25, 2002, Bilal met with BP Human Resources Representative Denise Lugo to lodge a complaint of race discrimination against Dietz. (Def.'s 56.1(a)(3) Statement ¶ 24). BP Human Resources investigated the complaint and concluded that it had no basis. (Id., ¶ 25). Bilal did not inform anyone at BP Human Resources or BP management that Dietz made racial remarks. (Id., ¶¶ 29-30).

Bilal's employment with BP ended on December 31, 2002. (Def.'s 56.1(a)(3) Statement ¶ 26). On January 10, 2003, Bilal filed a discrimination charge with the Equal Employment Opportunity Commission against BP. (Id., ¶ 27). Between December 2002 and March 2003, Bilal's attorney sent letters to BP officials, setting forth detailed accounts of the mistreatment Bilal allegedly suffered during his employment with BP. None of the letters mention racial comments by Dietz. (Id., ¶ 31). Bilal's counsel's position paper to the EEOC and a letter providing additional information to the EEOC did not mention any alleged racial comments by Dietz. (Id., ¶ 32). The EEOC investigator's notes from her interview with Bilal do not include any mention of racial comments by Dietz. (Id., ¶ 33).

Bilal's treating psychologist, Dr. Jeffrey Santee, had seven counseling sessions with Bilal between October 14, 2002 and December 5, 2002. Dr. Santee's notes from these sessions detail Bilal's adverse treatment by BP but do not mention racial comments by Dietz. (Def.'s 56.1(a)(3) Statement ¶ 34). Between December 5, 2002 and November 25, 2003, Bilal did not receive treatment from Dr. Santee. On November 25, 2003, a few weeks before Bilal filed the instant suit, Bilal visited Dr. Santee. Dr. Santee's notes reflect that Bilal told him about Dietz's alleged racial statements at the November 25, 2003 session. (Id., ¶ 35).

Bilal may prevail on his discrimination claims either through the "direct method" – showing intentional discrimination – or through the similar burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Blise v. Antaramian,* 409 F.3d 861, 866 (7th Cir. 2005) (*Blise*); *Bennett v. Roberts,* 295 F.3d 687, 697 (7th Cir. 2002) (same standard in a Title VII case applies to a Section 1981 claim). The direct method of proving discrimination requires the introduction of direct or circumstantial evidence of discrimination. Direct evidence requires, essentially, an admission by the defendant that the action was based on a prohibited animus. *See Blise,* 409 F.3d at 866. Bilal does not present direct evidence.

A plaintiff may also proceed under the direct method by constructing a "convincing mosaic" of circumstantial evidence that a jury would infer to be intentional discrimination. The circumstantial evidence must point directly to a discriminatory reason for the adverse action. *See Blise,* 409 F.3d at 866. Here, Bilal believes that Dietz

discriminated against him because of his race based on: (1) the alleged racial comments Dietz made at the May 29, 2001 meeting; (2) Bilal's belief that he had more seniority and better work performance compared to others who were not terminated; and (3) the presence of two different reasons for his termination-downsizing and poor performance.

As set out above, Bilal alleges that Dietz made the following racial remarks in May 2001: (1) "If it was left up to me, I wouldn't hire any of your kind"; (2) "You don't know who you are messing with, boy. You know we make the decisions here; you don't"; and (3) "If you cause trouble, I will destroy your black ass." (Id., ¶ 28). However, Bilal first claimed these statements were made a few weeks before filing suit and more than two years after he claims they were spoken. Under these circumstances, it is reasonable to question the truthfulness of the alleged racial statements of Dietz. *See Seshardi v. Kasraian,* 130 F.3d 798, 802 (7th Cir. 1997).

Moreover, the purported statements were made over a year before the decision was made to terminate Bilal's employment. Even accepting Bilal's assertion as credible, he has failed to demonstrate that the statements were proximate to and related to the decision to terminate his employment. *See Schreiner v. Caterpillar, Inc.,* 250 F.3d 1096, 1099 (7th Cir. 2001) (stray remarks unrelated to the alleged discriminatory decision are not sufficient to establish an inference of discrimination); *Bahl v. Royal Indem. Co.,* 115 F.3d 1283, 1293 (7th Cir. 1997) (derogatory comments do not evidence pretext to discrimination unless they are both proximate and related to the employment decision).

Bilal's personal belief that his work performance was not deficient as compared to some other employees who had less seniority also does not demonstrate intentional discrimination. In support of his argument that he had better work performance than others not terminated, Bilal relies only on his own deposition testimony. Furthermore, Bilal does not identify anyone with less seniority that had poor work performance who was not terminated. *See Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 980 (7th Cir. 2004) (plaintiff's self-evaluation does not create a genuine issue of material fact about the employer's honest performance assessment of inadequate performance); *Cardoso v. Robert Bosch Corp.*, 427 F.3d 429, 436 (7th Cir. 2005) (plaintiff's belief that he is better qualified is not evidence of pretext).

The alleged two different reasons for Bilal's termination also do not demonstrate intentional discrimination. To permit an inference of discrimination, different reasons for the adverse employment action must actually be shifting and inconsistent. *See Schuster v. Lucent Tech., Inc.*, 327 F.3d 569, 577 (7th Cir. 2003). Here, Bilal was informed he was being terminated because of downsizing and poor performance. These purported reasons are not inconsistent. Furthermore, Bilal concedes that two white employees were terminated by the same decision makers as part of the same decision-making process that led to Bilal's termination.

Bilal cites to *West v. Ortho-McNeil Pharmaceutical Corp.*, 405 F.3d 578 (7th Cir. 2005) (*West*), in support of his response to Defendants' motion. *West* is easily distinguished from Bilal's case.

In *West,* the trial court excluded evidence of seven discriminatory remarks allegedly made by West's supervisor on grounds that the remarks were time-barred. After West completed his case-in-chief, the court granted the defendant's motion for judgment as a matter of law. The Seventh Circuit reversed, finding that the seven remarks were not time-barred. *West,* 405 F.3d at 581. Furthermore, West's evidence – including the alleged discriminatory comments, other employees who were not discharged for the same conduct leading to West's termination, and West's claim that his supervisor encouraged him to take the action that led to his termination – presented a "close question" that must be decided by the jury. *West,* 405 F.3d at 581-82. The *West* court did not address whether the alleged comments were contemporaneous and related to the decision to terminate West. Furthermore, unlike the instant case, West presented other evidence of discrimination, including other employees who were not discharged for the same conduct leading to his termination and his claim that his supervisor encouraged him to take the action that led to his termination. Based on the facts before the Court, Bilal has failed to demonstrate a genuine issue of material fact exists as to whether he has established a claim of intentional race discrimination.

To establish a *prima facie* case of race discrimination under the *McDonnell Douglas* framework, Bilal is required to demonstrate that: (1) he was a member of a protected class; (2) he was meeting his employer's legitimate performance expectations; (3) he suffered an adverse employment action; and (4) similarly situated employees not

in the protected class were treated more favorably.[1] *See Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc.*, 254 F.3d 644, 650 (7th Cir. 2001). If Bilal demonstrates a *prima facie* case, the burden shifts to Defendants to demonstrate "a legitimate, nondiscriminatory reason for the action." *Blise,* 409 F.3d at 867. If Defendants meet this burden, the burden shifts back to Bilal to demonstrate the proffered reason is pretextual. *Blise,* 409 F.3d at 867.

Bilal has established that he is a member of a protected class and that he experienced an adverse employment action – his termination of employment. However, he has failed to establish that he was performing his job satisfactorily; and he has failed to identify any similarly situated individuals who were treated more favorably.

The undisputed facts demonstrate that: Bilal had a history of not meeting BP's expectations; Dietz tried to work with Bilal to aid Bilal in overcoming his deficiencies; and, ultimately, responsibilities were taken away from Bilal because of his deficiencies. In addition, Bilal has failed to identify any similarly situated individual who was treated more favorably. Contrary to any similarly situated individual who was treated more favorably, Bilal concedes that two white employees were terminated by the same decision makers as part of the same decision-making process that led to Bilal's termination.

Even if Bilal was able to establish a *prima facie* case, he has failed to establish that BP's reason for terminating his employment – his documented deficiencies in his work

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[1] Bilal's response does not address whether he established a claim of discrimination under the *McDonnell Douglas* framework. However, for completeness, the Court addresses this issue.

– was a pretext to race discrimination. A plaintiff can establish pretext by showing that the employer's explanation is unworthy of credence or that a discriminatory reason more likely motivated the employer. *Debs v. Northeastern Illinois Univ.*, 153 F.3d 390, 395 (7th Cir. 1998) (*Debs*). Pretext in this context does not mean a mistake; rather, it means "a lie, specifically a phony reason for some action." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995). An honest belief in the nondiscriminatory reason offered by the decision maker will be sufficient even if the reasons are foolish, trivial, or even baseless. *Debs*, 153 F.3d at 396.

As discussed above, the undisputed facts establish that Bilal had a history of work-related deficiencies, which led to his termination. Also, as discussed above, Bilal has failed to demonstrate that the decision to terminate him based on these deficiencies was a lie or pretext. Accordingly, Bilal has failed to demonstrate a genuine issue of material fact exists as to whether he has established a claim of racial discrimination under the *McDonnell Douglas* framework.

A plaintiff may prove retaliation claims under Title VII and Section 1981 by either the direct method of proof or an indirect method of proof derived from *McDonnell Douglas*.[2] However, "[i]t is axiomatic that a plaintiff engage in statutorily protected activity before an employer can retaliate against [him] for engaging in statutorily protected activity." *Herron v. DiamlerChrysler Corp.*, 388 F.3d 293, 302 (7th Cir. 2004). Thus, under either method of proof, a plaintiff must demonstrate that he engaged in

[2] Bilal does not address his retaliation claims in any manner in his response to Defendants' Motion for Summary Judgment.

protected activity before the adverse employment action took place. *Herron,* 388 F.3d at 302; *Durkin v. City of Chicago,* 341 F.3d 606, 615 (7th Cir. 2003) ("An employer cannot retaliate if there is nothing for it to retaliate against.").

Here, the decision to terminate Bilal's employment was made on July 18, 2002. Bilal did not file his first claim of discrimination until September 25, 2002, over two months after the decision to terminate his employment had already been reached and he had been advised of that decision. Accordingly, Bilal's retaliation claims fail.

CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment is granted.

Dated: January 10, 2006 /s/ John W. Darrah
JOHN W. DARRAH
United States District Judge

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 6, 2007

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 06-1951

KARRIS BILAL,

Plaintiff-Appellant,

v.

BP AMERICA, INCORPORATED, a Delaware corporation, and JAMES DIETZ,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 03 C 9253

John W. Darrah, *Judge.*

ORDER

On January 22, 2007, the plaintiff-appellant filed a petition for rehearing and petition for rehearing en banc. All the Judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore DENIED.

APPENDIX D

United States District Court

Northern District Of Illinois

Local Rules

LR56.1. Motions for Summary Judgment

a) Moving Party. With each motion for summary judgment filed pursuant to Fed.R.Civ.P. 56 the moving party shall serve and file –

(1) Any affidavits and other materials referred to in Fed.R.Civ.P. 56(e);

(2) a supporting memorandum of law; and

(3) a statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law, and that also includes:

(A) a description of the parties, and

(B) all facts supporting venue and jurisdiction in this court.

The statement referred to in (3) shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion. Absent prior leave of Court, a movant shall not file more than 80 separately-numbered statements of undisputed material fact.

If additional material facts are submitted by the opposing party pursuant to section (b), the moving party may submit a concise reply in the form prescribed in that section for a response. All material facts set forth in the statement filed pursuant to section (b)(3)(C) will be deemed unless controverted by the statement of the moving party.

(b) Opposing Party. Each party opposing a motion filed pursuant to Fed.R.Civ.P. 56 shall serve and file –

(1) Any opposing affidavits and other materials referred to in Fed.R.Civ.P. 56(e);

(2) a supporting memorandum of law; and

(3) a concise response to the movant's statement that shall contain:

(A) numbered paragraphs, each corresponding to and stating a concise summary of the paragraph to which it is directed, and

(B) a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon, and

(C) a statement, consisting of short numbered paragraphs, of any additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon. Absent prior leave of Court, a respondent to a summary judgment motion shall not file more than 40 separately-numbered statements of additional facts. All material facts set forth in the statement required of the moving party will be

deemed to be admitted unless controverted by the statement of the opposing party.

Committee Comment

Local Rule 56.1 is revised to set forth limits on the number of statements of fact that may be offered in connection with a summary judgment motion. The judges of this Court have observed that parties frequently include in their LR56.1 statements facts that are unnecessary to the motion and/or are disputed. The judges' observation is that in the vast majority of cases, a limit of 80 asserted statements of fact and 40 assertions of additional statements of fact will be more than sufficient to determine whether the case is appropriate for summary judgment. The number of statements of fact has been set in light of the requirement of section (a)(3), which requires that only "material facts" be set down. A party may seek leave to file more asserted statements of fact or additional fact, upon a showing that the complexity of the case requires a relaxation of the 80 or 40 statement limit.

Adopted April 20, 2006